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Attorney for Petitioner
RICHARD AYVAZYAN

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

RICHARD AYVAZYAN,	)	Case No.: 2:22-cv-8915
	)	
Petitioner	)	[CR No. 2:20-cr-579-SVW]
vs.	)	
	)	MOTION TO VACATE, SET
UNITED STATES OF AMERICA,	)	ASIDE, OR CORRECT
	)	SENTENCE UNDER 28 U.S.C. §
Respondent.	)	2255
_____	)	

Petitioner Richard Ayvazyan through undersigned counsel, hereby
respectfully moves this Court to vacate, set aside, or correct his sentence pursuant
to 28 U.S.C. § 2255.

DATED: December 8, 2022

Respectfully submitted,

/s/ Carlo Brooks
CARLO BROOKS

Attorney for Petitioner

**MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE
UNDER 28 U.S.C. § 2255**

I. INTRODUCTION

Petitioner Richard Ayvazyan, by and through his attorney, Carlo Brooks, hereby submits his motion to vacate, set aside, or correct his sentence. The government's entire case against Mr. Ayvazyan rests on an intentional egregious violation of petitioner's Fourth, Fifth, and Sixth Amendment rights based on the government's sustained pattern of misconduct, including a pretextual border stop and lies about the purpose of that stop, deprivation of the right to counsel, destruction of evidence, lying about that misconduct, abusing the grand jury process, disregarding *Brady* obligations, flagrantly violating court orders, and lying to the Court, and, above all, building the lynchpin of its case and "star witness" at trial out of undeniably tainted evidence.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The government's case against Petitioner and the resulting judgment rest *entirely* on the use of unconstitutionally obtained evidence.

Based on a suspicion of fraud committed by a certain Iuliia Zhadko and his company, Timeline Transport, in a PPP loan application, the government's sights turned to Mr. Ayvazyan because Zhadko was one of several friends and associates who transferred money to help make a down-payment on Mr. Ayvazyan's home. Based on Petitioner's decade-old record involving a non-jail plea, the government

1 assumed that he too must be culpable; however, the government had zero direct
2 evidence that Mr. Ayvazyan was involved in Zhadko's allegedly fraudulent
3 application.
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5 In an effort to fill this critical gap in its investigation, the government began a
6 pattern of misconduct that plagued the case from the beginning till the end. The
7 government unlawfully stopped, interrogated, and searched Petitioner based on a
8 pretextual invocation of the border search authority and "National Security." See
9 Dkt. 130, 135, 136. As case agent Justin Palmerton testified at the Miami bail
10 hearing, "once the CBP stopped for the secondary inspection, we learned that there
11 was a photograph of Iuliia Zhadko on the digital device and we made the
12 connection that Iuliia Zhadko was, in fact, an alias of Richard Ayvazyan." Oct. 22,
13 2020 Hr'g Tr. at 23-24, *United States v. Ayvazyan*, 20-mj-3857, Dkt. 17 (S.D. Fla.
14 Oct. 22, 2020) ("Oct. 22 Tr.").
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19 The tainted evidence from the October 19, 2020 Miami airport stop became
20 the *lynchpin* of the government's case against Mr. Ayvazyan. In effect, the fruit of
21 the pretextual Miami airport customs inspection ultimately found its way into
22 government trial exhibit GEX 10, which contained text messages in which
23 Petitioner and co-defendant Tamara Dadyan allegedly discussed the conspiracy.
24 Without that tainted evidence, the government would not have been able to obtain
25 the evidence seized at 17450 Weddington Street in Encino, California, the residence
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1 of Tamara Dadyan and Artur Ayvazyan, two of Defendants' accused
2 co-conspirators Weddington home, including Dadyan's phone, which contained the
3 text messages. The Government used Mr. Ayvazyan's tainted phone information to
4 obtain the search warrants on the Weddington residence.
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6

7 In March 2021, Defendants moved to suppress all of the evidence from the
8 Miami airport on the basis that the Fourth Amendment prohibited the warrantless
9 detention and searches the government conducted by deputizing Customs and
10 Border Protection (CBP) officials to the investigation of suspected PPP loan fraud.
11 See Dkt. 130, Motion to Suppress Evidence From Pretextual Detention and
12 Warrantless Searches. Defendants also moved to suppress all of the evidence from
13 the Miami airport on the basis that the search of Defendants' luggage and phones
14 violated the Fifth and Sixth Amendments. See Dkt. 135, Motion to Suppress
15 Evidence Collected in Violation of the Fifth and Sixth Amendments.
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19 On April 27, 2021, the Court granted in part Petitioner's Motion to Suppress
20 Evidence Collected in Violation of the Fifth and Sixth Amendments the motion in
21 part. As to the Fifth Amendment argument, the Court found a *Miranda* violation
22 and suppressed the evidence from Defendants' phones. See Dkt. 296.
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25 Notably, the Court found that Defendants' disclosure of their phone passcodes
26 was not voluntary. Dkt. 296 at 17. The Court found several factors compelled this
27 result. Defendants were in custody without being given *Miranda* warnings.
28

1 Defendants had been detained for approximately four hours when they provided
2 their phone passcodes and, at that time, Defendants had been separated from one
3 another and individually interrogated. *Id.*

4
5 The Court found that, most importantly, each defendant was induced to
6 provide their phone passcode with *false information*. *Id.* Specifically, Mr. Ayvazyan
7 was told that he only needed to search the cell phone for “national security
8 purposes and just to confirm that [he] was not a terrorist.” *See* Dkt. 133, Ayvazyan
9 Decl. ¶ 24; *see also id.*, Ex. 13 (transcript of video interrogation in which Ayvazyan
10 asks “What does credit cards have to do with national security that Ramirez is
11 talking about? What is it?”). Terabelian was told that agents needed to look at her
12 phone to see if Terabelian was a national security threat, and that Terabelian would
13 “be on the next flight” if she cooperated with agents. *See* Dkt. 133, Terabelian Decl.
14 ¶ 12.

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16 Under these circumstances, the Court found, the provision of passcodes by
17 Defendants to customs agents was not voluntary, and any evidence discovered on
18 Defendants’ smartphones at the Miami airport was ordered suppressed. Dkt. 296 at
19 18 (citing *United States v. Thompson*, 422 F.3d 1285, 1295–96 (11th Cir. 2005)
20 (“Sufficiently coercive conduct normally involves . . . the making of a promise that
21 induces a confession.”)).

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23 Yet while the Court granted Defendant’s Motion to suppress the physical
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1 fruits of an alleged Miranda violation at the Miami airport, the Court *rejected*
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3 Petitioner's argument that because the applications for warrants to search
4 Defendants' homes referenced the tainted evidence seized at the Miami airport, the
5 evidence seized during the search of Defendants' home was the fruit of the
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7 poisonous tree and should also be suppressed.¹

8 In his Motion to Suppress Evidence Seized at the Miami Airport on Fourth
9 Amendment Grounds, Petitioner argued that the government's entire case against
10 him was the fruit of a "disturbing emerging practice of law enforcement agencies
11 [directing] direct border officers to use their border search authority to investigate
12 alleged criminal conduct untethered from any border or national security concern.
13 The result is an "anything goes" free-for-all when hapless subjects of a domestic
14 criminal investigation happen to travel through an airport and are denied
15 fundamental rights." Dkt. 130 at 1.
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19 Petitioner argued that Ninth Circuit case law was controlling and that
20 precedent in *United States v. Cano*, 934 F.3d 1002, 1017 (9th Cir. 2019) expressly
21 forbade intrusive searches conducted for general law enforcement purposes, which
22 are distinguishable from the "routine searches" to "to prevent smuggling and to
23 prevent prohibited articles from entry, which are proper under the government's
24 plenary border search authority. *See* U.S. Const. art. I, § 8, cl. 1. Indeed, Petitioner
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¹ Later, in its August 20, 2021 Order denying Defendants' Kastigar Motion, the Court similarly concluded that the Weddington and Canoga homes were not added as search warrant targets based on tainted information

1 argued, as set forth in *Cano*, “[w]arrants are generally required ‘unless the
2 exigencies of the situation make the needs of law enforcement so compelling that
3 the warrantless search is objectively reasonable under the Fourth Amendment.’”
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5 *Cano*, 934 F.3d at 1010 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978).
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7 The Court agreed that the pretextual stop would have been unlawful if Ninth
8 Circuit law applied: “Indeed, under Ninth Circuit law, the search at issue falls
9 outside the scope of the border search exception. In the Ninth Circuit, ‘[a] border
10 search must be conducted to enforce importation laws, and not for general law
11 enforcement purposes.’ Dkt. 296 at 4 (quoting *Cano*, 934 F.3d at 1013). Therefore,
12 under *Cano* and general Fourth Amendment jurisprudence, to determine whether a
13 search was conducted for general law enforcement purposes, courts must conduct
14 an objective inquiry. Dkt. 296 at 5 (citing *Cano*, 934 F.3d at 1016 n.9).
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18 However, based on the Eleventh Circuit location of the search, Miami, FL, the
19 Court found that Eleventh Circuit law applied, and the search was lawful, because
20 in the Eleventh Circuit, “border searches of property are reasonable without any
21 level of suspicion.” Dkt. 296 at 4 (quoting *United States v. Touset*, 890 F.3d 1227,
22 1232, 1237 (11th Cir. 2018)). *United States v. Touset*, 890 F.3d 1227 (11th Cir.
23 2018) involved the “importation of contraband” – specifically, child pornography
24 on two laptops and two external hard drives in the traveler’s possession. *Id.* at 1230.
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27 The Court in *Touset* held that border agents needed no justification
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1 whatsoever to detain (for seventeen days) and forensically search electronic devices
2 of an American citizen returning from abroad. *Id.* at 1237. As stated in the
3 concurring opinion, “This new-found government position presents a different and
4 difficult question, one not addressed by the Supreme Court or (until today) any
5 appellate court. *Touset*, 890 F.3d at 1238-39 (Corrigan, J., concurring in part).
6 Justice Corrigan therefore concurred only in the Court’s alternative holding that
7 “the district court correctly denied *Touset*’s motions to suppress because the
8 forensic searches of his electronic devices were supported by reasonable
9 suspicion.” *Id.*
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14 What ensued was an essential “free for all” in which text messages featured at
15 trial (GEX 10) were selected using notes from the FBI or OIG Agent’s review of
16 Petitioner’s unconstitutionally seized phone. Under *Kastigar*, the government bears
17 the “heavy burden” of proving by a preponderance “that ‘all of the evidence it
18 proposes to use,’ and all of its trial strategy, were ‘derived from legitimate
19 independent sources.’” *United States v. Danielson*, 325 F.3d 1054, 1072 (9th Cir.
20 2003) (quoting *Kastigar*, 406 U.S. at 460). In addition to this prospective burden of
21 proof, the government must “demonstrate that ‘none of the evidence presented to
22 the grand jury is derived, directly or indirectly, from the immunized testimony[.]’”
23 *United States v. Hampton*, 775 F.2d 1479, 1489 (11th Cir. 1985).
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27 The record abounds with documents, pleadings and testimony showing both
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1 evidentiary and non-evidentiary uses by the government of the tainted information
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3 – use which the government must *disprove* to survive Kastigar scrutiny.

4 As set forth herein, the record shows that at every stage of the litigation
5 following the Miami customs stop, the government used tainted information and
6 derivative tainted information in many respects, including but not limited to
7 interpreting evidence, focusing the investigation, developing pre-trial strategy, and
8 building its case. It used Petitioner’s unlawfully seized phone as an investigatory
9 lead and to uncover other evidence, to present evidence or testimony to the grand
10 jury, to refuse to plea bargain, to plan or adjust trial strategy such as case theory,
11 anticipating defenses, selecting exhibits – especially Exhibit 10 – making witness
12 decisions, or planning examinations.
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16 Petitioner’s sentence was “imposed in violation of the Constitution or laws of
17 the United States,” and must be vacated and set aside.
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19 **III. ARGUMENT**

20 **A. Fourth Amendment Violation: The credit cards offered as evidence**
21 **at trial were seized as part of a pretextual border search that**
22 **violated the Fourth Amendment as applied in Ninth Circuit law.**
23 **The court erroneously applied Eleventh Circuit law even though**
24 **(a) if it was one circuit’s law, it should be the Ninth Circuit because**
25 **that’s where the search was directed from; (b) the court**
26 **misinterpreted Eleventh Circuit law; (c) the law at issue should**
27 **have been the Fourth Amendment, not one circuit’s jurisprudence,**
28 **and suppression of all fruits of the unlawful search and seizure was**
proper due as a matter of deterrence to the egregious violations of
Petitioner’s constitutional rights.

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3 *entirely* on the use of unconstitutionally obtained evidence.

4 Based on a suspicion of fraud committed by a certain Iuliia Zhadko and his
5 company, Timeline Transport, in a PPP loan application, the government's sights
6 turned to Mr. Ayvazyan because Zhadko was one of several friends and associates
7 who transferred money to help make a down-payment on Mr. Ayvazyan's home.
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9 assumed that he too must be culpable; however, the government had zero direct
10 evidence that Mr. Ayvazyan was involved in Zhadko's allegedly fraudulent
11 application.
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18 pretextual invocation of the border search authority and "National Security." *See*
19 Dkt. 130, 135, 136. As case agent Justin Palmerton testified at the Miami bail
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4 and suppressed the evidence from Defendants' phones. *See* Dkt. 296.
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6 Notably, the Court found that Defendants' disclosure of their phone passcodes
7 was not voluntary. Dkt. 296 at 17. The Court found several factors compelled this
8 result. Defendants were in custody without being given *Miranda* warnings.
9 Defendants had been detained for approximately four hours when they provided
10 their phone passcodes and, at that time, Defendants had been separated from one
11 another and individually interrogated. *Id.*
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13 The Court found that, most importantly, each defendant was induced to
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6 induces a confession.”).
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9 Yet while the Court granted Defendant's Motion to suppress the physical
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17 In his Motion to Suppress Evidence Seized at the Miami Airport on Fourth
18 Amendment Grounds, Petitioner argued that the government's entire case against
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21 alleged criminal conduct untethered from any border or national security concern.
22 The result is an “anything goes” free-for-all when hapless subjects of a domestic
23 criminal investigation happen to travel through an airport and are denied
24 fundamental rights.” Dkt. 130 at 1.
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Petitioner argued that Ninth Circuit case law was controlling and that precedent in *United States v. Cano*, 934 F.3d 1002, 1017 (9th Cir. 2019) expressly forbade intrusive searches conducted for general law enforcement purposes, which are distinguishable from the “routine searches” to “to prevent smuggling and to prevent prohibited articles from entry, which are proper under the government’s plenary border search authority. *See* U.S. Const. art. I, § 8, cl. 1.

The Court denied Defendants’ Motion to Suppress on Fourth Amendment grounds, chastising Petitioner for limiting its argument that the Miami airport search was not permissible under Eleventh Circuit to “a single footnote.” Dkt. 296 at 6. The Court countered that “[n]owhere in *Touset* did the Eleventh Circuit limit its holding to searches of electronic devices for child pornography.” *Id.* The Court then leaped to a second, crucial, conclusion based on its reading of the second portion of the *Touset* opinion, stating that in finding the record supported a finding of reasonable suspicion, the court in *Touset* “did not apply the standard Defendants suggest” and “analyze whether agents had reasonable suspicion of contraband” but rather applied a “broader” standard enunciated by the Eleventh Circuit in *Denson v. United States*, 574 F.3d 1318, 1339 (11th Cir. 2009): that reasonable suspicion must be based upon a “particularized and objective basis for suspecting the particular person of *criminal activity*.” Dkt. 296 at 7 (adding emphasis).

The Court’s misreading of Eleventh Circuit case law for the proposition that

1 CBP's search and seizure authority extends warrantless border searches based on
2 suspicion of general criminal activity was pivotal in this case. Critically, the Court's
3 interpretation of Eleventh Circuit case law allowed it to dismiss any notion that
4 Ninth Circuit or (analogous jurisprudence) might apply, and thereby find that the
5 forum agents' reliance "on the law of the situs" was reasonable when directing the
6 out-of-circuit search, Dkt. 296 at 12, and that "all agents involved fully complied
7 with Eleventh Circuit law." *Id.* at 12-13. This, in turn, caused the Court to find
8 Petitioner's arguments undermined by the Supreme Court's discussion in *Davis v.*
9 *United States*, 564 U.S. 229 (2011) regarding the circumstances warranting
10 deterrence. *See Davis*, 564 U.S. at 241 ("An officer who conducts a search in
11 reliance on binding appellate precedent does no more than ac[t] as a reasonable
12 officer would and should act under the circumstances.") Thus, concluded the Court,
13 "Applying those principles to the unique circumstances before the Court, deterrence
14 is not warranted merely because the Miami airport search violated Ninth Circuit
15 law." Dkt. 296 at 12.

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17 The Court noted that under *Davis*, deterrence would only be warranted if
18 forum agents from directing out-of-circuit searches that comply with the law of the
19 situs of the search "exhibited deliberate, reckless, or grossly negligent disregard for
20 Fourth Amendment rights." Dkt. 296 at 13 (citing *Davis*, 564 U.S. at 238). The
21 Court noted that nothing suggested Agent Palmerton "controlled the location of the
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1 border search.” *Id.* “In sum,” the Court concluded, “there is no ‘forum shopping’ to
2 deter here because no forum shopping occurred.” *Id.* at 14. Persuaded that the
3 government’s untested interpretation of Eleventh Circuit law controlled the case,
4 the Court concluded that “Eleventh Circuit law requires the denial of Defendants’
5 motion to suppress” on Fourth Amendment grounds. *Id.*

6
7
8 Petitioner argued that Ninth Circuit precedent in *United States v. Cano*, 934
9 F.3d 1002, 1017 (9th Cir. 2019) expressly forbade intrusive searches conducted for
10 general law enforcement purposes, which are distinguishable from the “routine
11 searches” to “to prevent smuggling and to prevent prohibited articles from entry,
12 which are proper under the government’s plenary border search authority. *See* U.S.
13 Const. art. I, § 8, cl. 1. Indeed, Petitioner argued, as set forth in *Cano*, “[w]arrants
14 are generally required ‘unless the exigencies of the situation make the needs of law
15 enforcement so compelling that the warrantless search is objectively reasonable
16 under the Fourth Amendment.’” *Cano*, 934 F.3d at 1010 (quoting *Mincey v.*
17 *Arizona*, 437 U.S. 385, 393-94 (1978).
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22 The Court agreed that the pretextual stop would have been unlawful if Ninth
23 Circuit law applied: “Indeed, under Ninth Circuit law, the search at issue falls
24 outside the scope of the border search exception. In the Ninth Circuit, ‘[a] border
25 search must be conducted to enforce importation laws, and not for general law
26 enforcement purposes.’ Dkt. 296 at 4 (quoting *Cano*, 934 F.3d at 1013). Therefore,
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1 under *Cano* and general Fourth Amendment jurisprudence, to determine whether a
2 search was conducted for general law enforcement purposes, courts must conduct
3 an objective inquiry. Dkt. 296 at 5 (citing *Cano*, 934 F.3d at 1016 n.9).

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5 However, based on the Eleventh Circuit location of the search, Miami, FL, the
6 Court found that Eleventh Circuit law applied, and the search was lawful, because
7 in the Eleventh Circuit, “border searches of property are reasonable without any
8 level of suspicion.” Dkt. 296 at 4 (quoting *United States v. Touse*, 890 F.3d 1227,
9 1232, 1237 (11th Cir. 2018)). *United States v. Touse*, 890 F.3d 1227 (11th Cir.
10 2018) involved the “importation of contraband” – specifically, child pornography
11 on two laptops and two external hard drives in the traveler’s possession. *Id.* at 1230.

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13 The Court in *Touse* held that border agents needed no justification
14 whatsoever to detain (for seventeen days) and forensically search electronic devices
15 of an American citizen returning from abroad. *Id.* at 1237. As stated in the
16 concurring opinion, “This new-found government position presents a different and
17 difficult question, one not addressed by the Supreme Court or (until today) any
18 appellate court. *Touse*, 890 F.3d at 1238-39 (Corrigan, J., concurring in part).
19 Justice Corrigan therefore concurred only in the Court’s alternative holding that
20 “the district court correctly denied Touse’s motions to suppress because the
21 forensic searches of his electronic devices were supported by reasonable
22 suspicion.” *Id.*

Touset’s holding that border searches of property are reasonable without any level of suspicion is anchored in Congress’ broad powers under the Commerce Clause “to prevent smuggling and to prevent prohibited articles from entry.” *Touset*, 890 F.3d at 1229. “[B]ecause child pornography is unprotected by the First Amendment, the Court reasoned, “Congress may declare it contraband and prohibit its importation.” *Id.* at 1232 (citing *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376-77 (1971); accord *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 128-29 (1973). Therefore, CBP’s 17-day detention and forensic search of the defendant’s two laptops and two external hard drives to prevent the “importation of contraband” – child pornography in the traveler’s possession –, the Court reasoned, did not require reasonable suspicion because such search and seizure was proper under the government’s plenary border search authority.

In his reply brief in Support of Motions To Suppress Evidence From Pretextual Detention and Warrantless Searches [Dkt. 208], Petitioner cited well-settled authorities and case law delimiting the nature of CBP’s police power. As Petitioner stated, “CBP has statutory authority to conduct border searches to ‘interdict[] persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States at a place other than a designated port of entry’ and to “deter and prevent the illegal entry of terrorists, terrorist weapons, persons, and contraband.”” Dkt. 208 at 8-9 (quoting 6

U.S.C. § 211(e)(3)(A)-(B)).

In its Opposition to Petitioner’s Motion [Dkt. 152], the government characterized items seized from the defendants’ phones, such as a photograph of a fake driver’s license, as “counterfeit access devices and identification documents,” which it argued were a “form of digital contraband,” subject to seizure like the pornographic images in *Touset*. Dkt. 152 at 9, 17. In his Reply, Petitioner made clear that no law declares third parties’ “access devices” to be contraband and prohibits their importation:

To the contrary, the definition of contraband that cannot be transported, concealed, or possessed on an aircraft includes drugs, weapons, counterfeit money, certain cigarettes, counterfeit versions of certain copyrighted materials, and goods bearing a counterfeit mark as defined under 18 U.S.C. § 2320. 49 U.S.C. § 80302(a)-(b); accord 19 U.S.C. § 4301 (adopting that definition and adding other goods whose importation is prohibited by the Tariff Act of 1930, i.e., the Act prohibiting importation of child pornography but not photographs of allegedly fake identification documents). Not one of the “AUTHORITY/REFERENCES” cited in the CBP memorandum provided by the government (Dkt. 152 Ex. 4 ¶ 4) references authority to interdict third parties’ access devices. Indeed, Counsel has been unable to find a single case, statute, or regulation that would take the step the government requests here and define CBP’s authority to search for “contraband” as including authority to search for third parties’ access devices.

Dkt. 208 at 9-10.

Based on the foregoing, Petitioner argued that whether or not a reasonable search for contraband would have been permissible, this was neither a search for

1 contraband nor a reasonable search and was “therefore unconstitutional under the
2 Fourth Amendment regardless of which circuit’s law applied.” Dkt. 208 at 15-16
3 n.19. Petitioner distinguished *Touset* as a case permitting searching for actual
4 digital contraband – child pornography – “rather than evidence of an intent-based
5 crime.” *Id.* (citing *Touset*, 890 F.3d at 1236; *see Cano*, 934 at 1015 n.8
6 (distinguishing *Touset* on this ground)).
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10 In denying Defendants’ Motion to Suppress on Fourth Amendment grounds,
11 the Court chastised Petitioner for limiting its argument that the Miami airport
12 search was not permissible under Eleventh Circuit to “a single footnote.” Dkt. 296
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14 its holding to searches of electronic devices for child pornography.” *Id.* The Court
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18 suggest” and “analyze whether agents had reasonable suspicion of contraband” but
19 rather applied a “broader” standard enunciated by the Eleventh Circuit in *Denson v.*
20 *United States*, 574 F.3d 1318, 1339 (11th Cir. 2009): that reasonable suspicion must
21 be based upon a “particularized and objective basis for suspecting the particular
22 person of *criminal activity*.” Dkt. 296 at 7 (adding emphasis).
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27 In emphasizing and seizing on the phrase “criminal activity,” the Court
28

1 completely lost sight of the contours of CBP’s statutory authority, which does not
2 permit it to conduct warrantless border searches based on reasonable suspicion of
3 general “criminal activity.” As Petitioner had taken pains to make clear in his
4 Motion and Reply, a border search must be conducted to enforce importation laws,
5 and not for general law enforcement purposes. *See* Dkt. 208 at 8-9 (quoting 6
6 U.S.C. § 211(e)(3)(A)-(B)) (CBP has statutory authority to conduct border searches
7 to “interdict[] persons attempting to illegally enter or exit the United States or
8 goods being illegally imported into or exported from the United States at a place
9 other than a designated port of entry” and to “deter and prevent the illegal entry of
10 terrorists, terrorist weapons, persons, and contraband.”).

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15 Nothing in *Touset* or *Denson* violate this bedrock principle because both
16 cases and the progeny they rely on involve searches for *importation of contraband*
17 – a circumstance *not present* in Petitioner’s case. *Denson* cannot stand for an
18 expansion of the contours of CBP’s search and seizure authority to warrantless
19 border searches based on suspicion of general criminal activity. *Denson* arose when
20 the defendant claimed customs agents violated her rights under the U.S.
21 Constitution and Florida tort law by searching her at the Miami airport after she
22 arrived aboard a flight from Jamaica “on the purported suspicion that she was
23 attempting to smuggle narcotics into the United States inside her alimentary canal.”
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27 *Denson*, 574 F.3d at 1323. As expressly stated in *Denson*, cases like *Denson* and
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1 *Touset* involve searches for the interception of contraband, not intrusive searches
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3 conducted for general law enforcement purposes:

4 Reasonable suspicion requires more than mere fanciful
5 conjecture; it must be based upon a “particularized and
6 objective basis for suspecting the particular person . . . of
7 criminal activity.” *United States v. Cortez*, 449 U.S. 411,
8 417-18, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981).
9 Although this standard imposes limits on a Customs
10 official’s discretion after an individual has crossed the
11 border, *it relaxes the normal warrant requirement of*
12 *probable cause in recognition of the “many difficulties*
13 *that attend the attempt[s] to intercept contraband and to*
14 *apprehend increasingly mobile and sophisticated*
15 *smugglers.” United States v. Bilir*, 592 F.2d 735, 739-40
16 (4th Cir. 1979)

17 *Denson*, 574 F.3d at 1341 (emphasis added).

18 The Court’s misreading of Eleventh Circuit case law for the proposition that
19 CBP’s search and seizure authority extends warrantless border searches based on
20 suspicion of general criminal activity was pivotal in this case. Critically, the Court’s
21 interpretation of Eleventh Circuit case law allowed it to dismiss any notion that
22 Ninth Circuit or (analogous jurisprudence) might apply, and thereby find that the
23 forum agents’ reliance “on the law of the situs” was reasonable when directing the
24 out-of-circuit search, Dkt. 296 at 12, and that “all agents involved fully complied
25 with Eleventh Circuit law.” *Id.* at 12-13. This, in turn, caused the Court to find
26 Petitioner’s arguments undermined by the Supreme Court’s discussion in *Davis v.*
27 *United States*, 564 U.S. 229 (2011) regarding the circumstances warranting
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1 deterrence. *See Davis*, 564 U.S. at 241 (“An officer who conducts a search in
2 reliance on binding appellate precedent does no more than ac[t] as a reasonable
3 officer would and should act under the circumstances.”) Thus, concluded the Court,
4 “Applying those principles to the unique circumstances before the Court, deterrence
5 is not warranted merely because the Miami airport search violated Ninth Circuit
6 law.” Dkt. 296 at 12.
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9 The Court noted that under *Davis*, deterrence would only be warranted if
10 forum agents from directing out-of-circuit searches that comply with the law of the
11 situs of the search “exhibited deliberate, reckless, or grossly negligent disregard for
12 Fourth Amendment rights.” Dkt. 296 at 13 (citing *Davis*, 564 U.S. at 238). The
13 Court noted that nothing suggested Agent Palmerton “controlled the location of the
14 border search.” *Id.* “In sum,” the Court concluded, “there is no ‘forum shopping’ to
15 deter here because no forum shopping occurred.” *Id.* at 14. Persuaded that the
16 government’s untested interpretation of Eleventh Circuit law controlled the case,
17 the Court concluded that “Eleventh Circuit law requires the denial of Defendants’
18 motion to suppress” on Fourth Amendment grounds. *Id.*
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23 Yet The Court failed to consider CBP agents’ violation of their own
24 regulations and policies, which apply regardless of the “situs of the search”
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26 It is undisputed based on the above-described CBP and FBI conduct that
27 deterrence and suppression of *all* unconstitutionally obtained evidence, including
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1 evidence that was utilized to obtain the search warrants, was warranted. It is true
2 that to trigger the exclusionary rule, police conduct must be sufficiently deliberate
3 that exclusion can meaningfully deter it. The police conduct here was sufficiently
4 deliberate under any circuit law.” CBP agents deliberately fabricated a “national
5 security concern” as a pretext for the search and the search was not for “importation
6 of contraband,” but for aiding the FBI in investigating the alleged PPP loan fraud.
7 The Court limited its inquiry to whether forum agents directing out-of-circuit
8 searches complied with “the law of the situs of the search.” As set forth above, they
9 did not. Yet the Court failed to consider CBP agents’ violation of their own
10 regulations and policies, which apply regardless of the “situs of the search”
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15 There exists a line of venerable Ninth Circuit case law holding that egregious
16 Fourth Amendment violations warrant the application of the exclusionary rule in
17 civil proceedings, such as CBP border inspections. *See Gonzalez-Rivera v. INS*, 22
18 F.3d 1441, 1448 (9th Cir. 1994); *Sanchez v. Sessions*, 904 F.3d 643 (9th Cir. 2017)
19 (evidence obtained in an unlawful manner will be excluded from civil proceedings
20 (1) “when the agency violates a regulation promulgated for the benefit of
21 petitioners and that violation prejudices the petitioner’s protected interests” and (2)
22 “when the agency egregiously violates a petitioner’s Fourth Amendment rights.”)
23 Part 162 of Chapter I of Title 19 of the Code of Federal Regulations Customs sets
24 forth the rules which regulate U.S. Customs and Border Protection’s Inspection,
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1 Search, and Seizure powers. 19 CFR § 162.21 of Subpart C, “Seizures,” provides
2 that “Property may be seized, if available, by any Customs officer *who has*
3 *reasonable cause to believe that any law or regulation enforced by Customs and*
4 *Border Protection or Immigration and Customs Enforcement has been violated*, by
5 reason of which the property has become subject to seizure or forfeiture.” 19 C.F.R.
6 § 162.21 (Lexis Advance through the Nov. 30, 2022 issue of the Federal Register,
7 with the exception of the amendments appearing at 87 FR 71748, 87 FR 73400, 87
8 FR 73433, and 87 FR 73488).

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12 Here, Mr. Ayvazyan’s interest in being free from pretextual searches and
13 seizures clearly fall within the purposes of 19 C.F.R. § 162.21. CBP admittedly did
14 not have “reasonable cause” to believe that any law or regulation enforced by
15 Customs and Border Protection or Immigration and Customs Enforcement had been
16 violated. There was no “reasonable cause” to believe Petitioner was attempting to
17 import contraband. CBP officers falsified their reports by stating that the search and
18 detention occurred “for purposes of national security.” CBP conducted a series of
19 searches of private smartphones over the course of almost four hours, lied about the
20 purpose of their search, violated CBP policy by executing the search without the
21 travelers present, and clearly violated 19 C.F.R. § 162.21. Bad faith constitutional
22 violations are *per se* egregious. *See Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5
23 (9th Cir. 1994) (“Federal courts cannot countenance deliberate violations of basic
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1 constitutional rights. To do so would violate our judicial oath to uphold the
2 Constitution of the United States.”); *Adamson v. C.I.R.*, 745 F.2d 541, 546 (9th Cir.
3 1984). Because the pretext search and seizure by CBP agents was an egregious
4 constitutional violation and per se violation of 19 C.F.R. § 162.21, the violation
5 required suppression of the evidence obtained, regardless of whether the FBI agents
6 directing the out-of-circuit search complied with Ninth Circuit, Eleventh Circuit, or
7 any circuit case law.

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11 Thus, despite egregious violations of the Fourth Amendment and the agency’s
12 own regulations, the Court found the government to be free of misconduct and
13 therefore deterrence completely unwarranted. Yet Petitioner was severely
14 prejudiced and irreparably harmed by the government’s conduct. As such,
15 Petitioner’s sentence was imposed in violation of the Constitution or laws of the
16 United States, and must be set aside.

17
18
19 **B. The government obtained an extension of the search warrant – that**
20 **ultimately provided the key evidence at trial – on an *ex parte* basis**
21 **without statutory authority for doing so. The government – despite**
22 **already telling the defense that it was reviewing the phones to seek**
23 **a superseding indictment – lodged as its only reason for proceeding**
24 ***ex parte* that it could not disclose that information to the defense.**
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1 In his April 21, 2021 Motion to Dismiss for Prosecutorial Misconduct,
2
3 Petitioner provided a chart Section II.C describing the many examples of how the
4 government abused the grand jury process to continue gathering evidence regarding
5 the entities and people in the initial indictment. The government's misconduct also
6 extended to failing to disclose to the Court that it planned all along to supersede on
7 the same conspiracy charged in November as a way of evading its Speedy Trial and
8 Discovery Order obligations.
9

10
11 In October and November 2020, the government filed both a complaint and
12 indictment alleging probable cause to believe that many of the loans and entities in
13 the superseding indictment were part of the same conspiracy as the original
14 indictment. For example, in the October 20, 2020 complaint, the government
15 alleged probable cause to believe that Edward Paronyan submitted the allegedly
16 fraudulent Redline Auto Collision loan application in the indictment. Compare
17 Compl. ¶¶ 26.c-e (Dkt. 152 Ex. 11 at 68), with Superseding Ind. Overt Acts 29-31
18 (Dkt. 154 at 18). Similarly, the November 3, 2020 search warrant application
19 alleged that Ayvazyan and Terabelian had "stolen" the identity of N.T. and used that
20 identity to apply for disaster loans, i.e., Counts Eleven and Twenty-Two in the
21 superseding indictment, but it held those allegations back for four more months.
22 Compare Search Warrant App. ¶¶ 33.k, 62.d (Dkt. 152 Ex. 11 at 31, 44-45), with
23 Superseding Ind. ¶¶ 37, 44-45 (Dkt. 154 at 29-30, 36). But the government held
24 these allegations and others back from the indictment, and instead succeeded in
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1 using a superseding indictment to *extend* its evidence gathering process without
2 being bound by the limitations in Fed. R. Crim. P. 16 and 17.

3
4 The Court made clear that the government could not leverage COVID-19 as
5 an opportunity to build out its case, but that is precisely what the government did.
6 From the moment Ayvazyan invoked his speedy trial rights, the government
7 appears to have intentionally manipulated the grand jury process to lengthen the
8 time during which it could build a case against Ayvazyan without disclosing tainted
9 information to the defense. As described in Petitioner's April 21, 2021 Motion to
10 Enforce the December 22, 2020 Discovery Order, the government violated the
11 Court's discovery order and continued producing documents after the Court's
12 March 15 deadline. Dkt. 248.

13
14 The government attempted to excuse its blatant violations of the Discovery
15 Order by misrepresenting what it was producing, claiming that the documents
16 related to the superseding indictment. The government's excuses fall flat for three
17 reasons. First, as reflected in the Chart in Ayvazyan's Reply in Support of his
18 Motion to Enforce the Court's December 22, 2020 Discovery Order (Dkt. 287 at
19 6-8), many of the late productions relate to the entities and loans in the initial
20 indictment. *Second, nothing in the Court's Discovery Order contemplated an*
21 *extension of the order should the government file a superseding indictment. The*
22 *March 15 discovery deadline did not contain an exception where the prosecutors –*
23 *who had already alleged a conspiracy involving others known to the government –*
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1 could evade their obligations by seeking another indictment of the same
2
3 conspiracy. Third, even if the late-produced documents only concerned the new
4 conduct alleged in the superseding indictment (which they did not), all of the
5 documents produced to date relate to one conspiracy – the one charged in the
6 November indictment. Indeed, the pre-March 12 indictment discovery included
7 documents related to every one of the new defendants and new allegations that
8 were allegedly part of the same overarching conspiracy. The government’s dumping
9 of data related to this alleged overarching conspiracy and continued production
10 after the close of discovery violated the Court’s Discovery Order and operated as an
11 extension of the search warrant that ultimately provided the key evidence at trial.
12
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14
15 **C. In Violation of Petitioner’s Fourth and Fifth Amendment rights,**
16 **the text messages featured at trial (GEX 10) were selected using**
17 **notes from the FBI or OIG Agent’s review of an unconstitutionally**
18 **seized phone.**
19

20 At a *Kastigar* hearing, the government bears the “heavy burden” of proving
21 by a preponderance “that ‘all of the evidence it proposes to use,’ and all of its trial
22 strategy, were ‘derived from legitimate independent sources.’” *United States v.*
23 *Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003) (quoting *Kastigar*, 406 U.S. at
24 460). In addition to this prospective burden of proof, the government must
25 “demonstrate that ‘none of the evidence presented to the grand jury is derived,
26 directly or indirectly, from the immunized testimony[.]’” *United States v. Hampton*,

1 775 F.2d 1479, 1489 (11th Cir. 1985). “The particular proof that will satisfy the
2 government’s ‘heavy burden,’ ... [varies] from case to case....” *Danielson*, 325 F.3d
3 at 1072. But “the mere assertion by the government of ‘the integrity and good faith
4 of the prosecuting authorities’ is not enough. ... Rather, the government must
5 present evidence” to carry its burden. *Id.*; see *United States v. Mapelli*, 971 F.2d
6 284, 288 (9th Cir. 1992).

7
8
9 The onus is on the government to disprove both evidentiary and
10 non-evidentiary uses of the tainted information. The government must prove that it
11 did not use the tainted information or any derivative information in any respect,
12 including but not limited to: To interpret evidence, focus the investigation, develop
13 pre-trial strategy, or to build a case; As an investigatory lead or to uncover other
14 evidence; To identify, prepare, refresh, or in any way impact the statement of a
15 witness; To decide to initiate prosecution; To present evidence or testimony to the
16 grand jury; To refuse to plea bargain; To plan or adjust trial strategy such as case
17 theory, anticipating defenses, selecting exhibits, making witness decisions, or
18 planning examinations. See, e.g., *Kastigar*, 406 U.S. at 460; *Dudden*, 65 F.3d at
19 1467; *Hsia*, 131 F. Supp. 2d at 202. See, e.g., *United States v. North*, 910 F.2d 843,
20 860-63, on pet. for reh’g, 920 F.2d 940 (D.C. Cir. 1990); *Hampton*, 775 F.2d at
21 1488; see also *United States v. Allen*, 864 F.3d 63, 93 (2d Cir. 2017). See, e.g.,
22 *Danielson*, 325 F.3d at 1072; *Dudden*, 65 F.3d at 1467. *United States v. Zielzinsky*,
23 740 F.2d 727, 733 (9th Cir. 1984); *Hampton*, 775 F.2d at 1485 (11th Cir. 1985). See,
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1 e.g., *Danielson*, 325 F.3d at 1072; *Hsia*, 131 F. Supp. 2d at 202. See, e.g.,
2
3 *Danielson*, 325 F.3d at 1072; *Mapelli*, 971 F.2d at 287; *Dudden*, 65 F.3d at 1467;
4 *Benson*, 2016 WL 215233, at *4.

5 In short, the government must prove that there was no “link in the chain”
6 involving tainted evidence and that Ayvazyan and Terabelian will be left “in
7 substantially the same position” as if their Fifth Amendment rights had never been
8 violated. See *Kastigar*, 406 U.S. at 462.
9

10 On April 27, 2021, the Court granted in part Petitioner’s Motion to Suppress
11 Evidence Collected in Violation of the Fifth and Sixth Amendments the motion in
12 part. As to the Fifth Amendment argument, the Court found a *Miranda* violation
13 and suppressed the evidence from Defendants’ phones. See Dkt. 296. Yet while the
14 Court granted Defendant’s Motion to suppress the physical fruits of the *Miranda*
15 violation at the Miami airport, the Court *rejected* Petitioner’s argument that because
16 the applications for warrants to search Defendants’ homes referenced the tainted
17 evidence seized at the Miami airport, the evidence seized during the search of
18 Defendants’ home was the fruit of the poisonous tree and should also be
19 suppressed.²
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24 Later, despite the evidence adduced in Defendants’ May 17, 2021 Motion For
25 A Kastigar Hearing, To Disqualify The Prosecution Team, And To Dismiss [Dkt.
26 338] and the July 28, 2021 and July 29, 2021 hearings thereon [Dkt. 820, 821; 813,
27
28

² Later, in its August 20, 2021 Order denying Defendants’ Kastigar Motion, the Court similarly concluded that the Weddington and Canoga homes were not added as search warrant targets based on tainted information

1 814 (hearing transcripts)], the Court found that messages featured at trial (GEX 10)
2 and which were selected using notes from the FBI or OIG Agent’s review of
3 Petitioner’s unconstitutionally seized phone passed muster under *Kastigar*’s strict
4 standards. Petitioner demonstrated irrefutable “links in the chain” involving tainted
5 evidence – specifically, the use of his unconstitutionally seized phone – to what
6 came to be known as the government’s “star witness” in the case and trial:
7 Government Exhibit 10 (“GEX 10”), Dkt. 113 (transcript of July 28, 2021 *Kastigar*
8 hearing) at 196.
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12 As case agent Justin Palmerton testified at the Miami bail hearing, “once the
13 CBP stopped for the secondary inspection, we learned that there was a photograph
14 of Iuliia Zhadko on the digital device and we made the connection that Iuliia
15 Zhadko was, in fact, an alias of Richard Ayvazyan.” Oct. 22, 2020 Hr’g Tr. at
16 23-24, *United States v. Ayvazyan*, 20-mj-3857, Dkt. 17 (S.D. Fla. Oct. 22, 2020)
17 (“Oct. 22 Tr.”). As Defendants set forth in their *Kastigar* Motion and at the
18 hearings, the illegal search and seizure directed by Agent Palmerton *was* the
19 precursor to Government Exhibit 10. This is because Petitioner’s unlawfully seized
20 phone (referred to as the “Zhadko phone” or “phone 1B23”) contained the “mirror
21 image” of many of the text messages from the Tamara Dadyan phone (“phone
22 1B21), which was obtained via the search warrant on the Weddington Street
23 residence. Up to six to seven weeks before trial, between February and May 2021,
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1 Agent Palmerton hardly touches the Dadyan phone; he relies on its mirror image,
2 phone 1B23, Petitioner's phone. Dkt. 113 (transcript of July 28, 2021 Kastigar
3 hearing) at 197.
4

5 **D. The government's failure to use a taint team meant that all of their**
6 **review and trial strategy happened with tainted evidence in mind,**
7 **in violation of Petitioner's Fifth Amendment rights.**
8

9 When the U.S. Department of Justice seizes potentially privileged files or
10 devices, the fundamental protections offered by the attorney-client privilege,
11 attorney work product protection, and other privileges and protections are put at
12 risk. "Taint teams," also referred to as "filter teams" or "privilege teams" are a team
13 of prosecutors and agents who are, *in theory*, screened from the investigation team
14 and asked to pass along only those communications that are neither privileged nor
15 protected by constitutional rights. *See* Justice Manual § 9-13.420; *see also id.* §
16 9-13.400(D)(7) ("In executing a warrant . . . , investigators should use protocols
17 designed to minimize intrusion into potentially protected materials . . . , including
18 but not limited to keyword searches (for electronic searches) and filter teams.")
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23 The prosecution team in the instant case purportedly used a filter team. *See*
24 Dkt. 813, Kastigar hearing transcript, at 25-25; 136; 192; 213-214. However,
25 government testimony proves that the taint from Petitioner's unlawfully seized
26 phone was hardly "filtered." Agent Palmerton testified that the Cellebrite reports
27 from the digital devices from the Miami seizure were released to him from the filter
28

1 team on February 23, 2021. *Id.* at 25. Agent Palmerton reviewed phone 1B123
2 which was registered to Zhadko, and the other was 1B126, which was registered to
3 a Victoria Kauichko, approximately once per week from February 24 and April 27
4 2021. *Id.* at 26-27. He exported what he thought were relevant text messages into a
5 PDF format. *Id.* at 27. IRS Criminal Investigation Special Agent Geffrey Clark
6 “never spoke with the filter team.” *Id.* at 136. Prior to April 27, 2021, no one
7 provided Agent Clark with information from *any other other phones* besides the
8 Miami phones. *Id.* Agent Clark reviewed the Tamara Dadyan phone, of which the
9 Zhadko phone contained the mirror image, but as of April 26, 2021, that phone had
10 *not* been released from the filter team to the government team. *Id.* at 136-137. In
11 other words, the Tamara Dadyan phone was not purged of the taint of the Zhadko
12 phone – Petitioner’s phone.
13

14 The testimony demonstrates that no tainted information was filtered in any
15 meaningful way. The government’s “fox” was left in charge of the Defendants’
16 “henhouse” and unfiltered information flowed from agent to agent. There was no
17 judicial review before any tainted materials could be released to the prosecution
18 team. Petitioner’s Fifth Amendment rights were clearly violated.
19

20 **E. The Court’s substantively unreasonable or even unconscionable**

21 **total sentence and departure from the guidelines calculation was an**
22 **unlawful and procedurally unreasonable sentence, especially in**
23 **light of the fact that the proceeding was held *in absentia*.**
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1 On September 8, 2021, Petitioner's counsel sought leave of the Court to
2 withdraw because Petitioner had not provided counsel with any instructions or
3 authorized counsel to advocate for one outcome or another at sentencing. Dkt. 942.
4 The Court denied that motion and directed counsel to proceed with sentencing in
5 absentia. Dkt. 980. Petitioner's counsel was forced to submit a sentencing
6 memorandum as a submission of counsel alone with the risk of prejudice to
7 Petitioner's rights.
8

9
10 In his Memorandum, Petitioner's counsel made clear that this was a rare case
11 in which other defendants around the country allegedly committed substantially
12 similar crimes at substantially similar times. A summary submitted to the Court of
13 substantially all sentences of PPP/EIDL loan fraud cases involving loss amounts
14 similar to this case made one takeaway clear: a sentence of no more than 72 months
15 was appropriate for Ayvazyan. The 286-month sentence suggested by Probation,
16 which appeared to be driven by its adherence to the proposed Guidelines range, was
17 substantially greater than any sentence imposed on similarly situated defendants
18 across the country. However, as pointed out by counsel, the Guidelines range was
19 81-95 months of incarceration: 57-71 months for the money laundering counts
20 (Counts 1-20, 26) plus a consecutive 24-month term for the aggravated identity
21 theft counts (Counts 21 and 22). This potential 95 months of imprisonment was still
22 exceeded by orders of magnitude the Court's "overarching duty" at sentencing to
23 impose the most lenient sentence possible that is sufficient to serve the sentencing
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1 purposes in Section 3553(a)(2). *Pepper v. United States*, 562 U.S. 476, 491 (2011);
2
3 *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc) (central tenet of
4 sentencing is that a criminal sentence must be sufficient, but not greater than
5 necessary to serve the purposes codified in 18 U.S.C. § 3553(a)(2)). The precedent
6 from PPP/EIDL loan fraud cases affirmed that a sentence of 72 months was
7 sufficient but not greater than necessary.
8

9 At the November 15, 2021 Sentencing Hearing, which was conducted in
10 absentia, the Court ultimately elected to fashion a sentence that comported neither
11 with the guidelines calculation nor the sentencing purposes in Section 3553(a)(2).
12 See Dkt. 1166 (minutes); 1154 (transcript). Petitioner’s counsel reiterated to the
13 Court that a “sentence of 72 months would put Mr. Ayvazyan towards the very
14 upper end of that greater than 20 of the 22 defendants including several that we
15 summarized in our papers that I believe are more culpable than Mr. Ayvazyan.”
16 Dkt. 1154 at 18. The government advocated for 159 months: “135 which is top end
17 of the guidelines range plus 24 mandatory minimum.” *Id.* at 23. For un-enunciated
18 reasons, The Court elected to go beyond the guidelines and the government’s own
19 recommendation and sentenced Petitioner to *180 months* (“15 years on each of
20 Counts 1 through 20 and 15 years on Count 26 to be served concurrently”) plus 24
21 months on each of Counts 21 and 22 to be served concurrently with each other but
22 consecutive to the terms imposed on Counts 1 through 20 and 26 – i.e., *a total of*
23 *204 months*. *Id.* at 26.
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1 The Court's "reasoning" for the sentencing was not based on fact or law, but
2 on its own personal view of the case. "Not to sound hyperbolic, but, in the Court's
3 experience which now is in excess of 30 years, I can't recall a fraud case that was
4 conducted in a more calloused, intentional way without any regard for the law." *Id.*
5 at 29. "I mean, the sentence is necessary to reflect the seriousness of the offense, to
6 promote respect for the law and to provide just punishment for the offense. The
7 Court recognizes that in the universe of white collar cases, this is a sentence that is
8 very meaningful and not unprecedented but certainly at the higher range of
9 sentences that this Court has imposed and other courts have imposed. But, given the
10 nature of what was introduced at trial, the Court is convinced that this is the least
11 sentence that the Court can impose to satisfy the element of promoting respect for
12 the law and to provide punishment and, on the second factor, adequate deterrence to
13 criminal conduct." *Id.*

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19 Notably, in support of the admittedly exemplary sentencing, the Court relied
20 on the text messages from Petitioner's unlawfully seized and tainted phone: "He
21 says, for example, *in the text messages*, I didn't sleep all night, I was working 24
22 hours straight, this program is over at the end of the month, get as much as we can.
23 And he and Tamara Dadyan described their fraud as an achievement."

24
25 The Court's words speak for themselves. A scope of the taint extended all the
26 way to Petitioner's substantively unreasonable and unconscionable in absentia
27 sentence. Petitioner's phone was not derived from a legitimate independent source.
28

1 It was used as an investigatory lead or to uncover other evidence, which tainted the
2 entire case, including the sentence. *See, e.g., Danielson*, 325 F.3d at 1072; *United*
3 *States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995). Petitioner’s sentence must be
4 set aside.
5

6
7 Moreover, the government was free to proceed with a fugitive complaint to
8 further enhance the sentence based on flight, while the government gamed the
9 extradition process by waiting until the last minute to extract Petitioner from
10 Montenegro, in an apparent effort to deprive him of his ability to appeal or
11 collaterally attack his sentence.
12

13 **F. Holding the *Kastigar* hearing after trial denied Petitioner of the**
14 **ability to plead guilty and due process right to bargain with the**
15 **government knowingly and intelligently.**
16

17 A defendant has a due process right to bargain with the government
18 knowingly and intelligently (presumably advised by competent counsel) and
19 explicitly offered to forego a constitutional claim in exchange for a benefit, except
20 in unusual circumstances where a claim cannot be waived. *See United States v.*
21 *Doyle*, 348 F.2d 715, 718-19 (2d Cir.), cert. denied, 382 U.S. 843 (1965).
22
23

24 Here, on May 18, 2021, the Court ordered the *Kastigar* hearing would be held
25 on May 26, 2021, *before trial*. Dkt. 341. However, on May 19, 2021, the
26 government filed ex parte application for Reconsideration of the Scheduling Order
27 Setting *Kastigar* Hearing, arguing, *inter alia*, that “considerations of judicial
28

1 economy counsel in favor of holding a *Kastigar* hearing after trial” because
2 “[w]hereas a pre-trial *Kastigar* hearing requires the parties and the Court to *predict*
3 *what evidence will ultimately be received*, a post-trial hearing enables the factfinder
4 to adjudicate the issues with the benefit of knowing the evidence that was actually
5 used at trial.” Dkt. 344 at 11 (emphasis added). “Moreover,” the government
6 added, “the jury’s verdict (*or an entry of a pre-trial guilty plea by any defendant*)
7 could very well influence the scope of the inquiry or obviate the need for it
8 altogether.”
9

10
11
12 In opposition to the government’s timing argument, Petitioner argued that the
13 government’s argument that it was “almost impossible to predict the evidence that
14 will be admitted at trial” was nonsensical given that the government claimed to be
15 “ready to proceed to trial” on April 5, 2021. Dkt. 351 at 17 n.17 (citing Dkt. 267-2).
16 “It is hard to fathom how the government could be ready to proceed to trial, yet not
17 know which exhibits it intends to use in its case-in-chief or their admissibility. ...
18 At this point, the government should know with a reasonable degree of certainty
19 which exhibits it intends to introduce in its case-in-chief.” *Id.*
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23 Indeed, after trial and once the post-trial *Kastigar* hearing was held, it became
24 imminently clear the government knew which exhibits it intended to use in its
25 case-in-chief – namely, the text messages featured at trial which were selected
26 using notes from the FBI or OIG Agent’s review of Petitioner’s unconstitutionally
27 seized phone, which made their way into what came to be known as the
28

1 government's "star witness" in the case and trial: GEX 10. *See* Dkt. 113 (transcript
2 of July 28, 2021 Kastigar hearing) at 196. At the time of the government's ex parte
3 application, Petitioner's unlawfully seized phone (phone 1B23) was being used as
4 the "mirror image" to select the text messages from the Tamara Dadyan phone
5 ("phone 1B21), which was obtained from the Weddington Street residence.
6
7 Therefore, it was *not* "almost impossible to predict the evidence that [would] be
8 admitted at trial." Without the benefit of *Kastigar* review, GEX 10 was almost
9 certain to be admitted at trial in light of the Court's limited suppression of
10
11 Petitioner's phone.
12

13 At a *Kastigar* hearing, the government bears the "heavy burden" of proving
14 by a preponderance "that 'all of the evidence it proposes to use,' and all of its trial
15 strategy, were 'derived from legitimate independent sources.'" *United States v.*
16 *Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003) (quoting *Kastigar*, 406 U.S. at
17 460). The government must prove that it did not use the tainted information or any
18 derivative information in any respect, including but not limited to, *refusing to plea*
19 *bargain*. *See, e.g., United States v. Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003);
20 *United States v. Hsia*, 131 F. Supp. 2d 195, 202 (D.D.C. 2001).
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24 The government's concern of "an entry of a pre-trial guilty plea by any
25 defendant" was disingenuous as it made no offer to Petitioner before trial. It goes
26 without saying that if Petitioner learned pre-trial that the government's makings of
27 GEX 10 would be found to be free of taint, he could have exercised his due process
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1 right to bargain with the government knowingly and intelligently and forego trial
2 (and other constitutional claims) in exchange for the benefit of a plea in line with
3 the level of punishment his co-defendants received. Instead, due to the
4 government's trial tactics and lack of candor to the Court, Petitioner was deprived
5 of this right.
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8 **G. The Government's Failure to turn over *Brady* Evidence Warrants**

9 **Vacatur of the Conviction**

10
11 In, *Brady v. Maryland*, 373 U.S. 83 (1963) the U.S. Supreme Court ruled that
12 suppression by the prosecution of evidence favorable to a defendant who has
13 requested it violates due process. "One of the principal, sworn duties of a
14 prosecutor is to disclose to a defendant all material, favorable evidence, including
15 impeachment evidence, in the Government's possession." *United States v. Govey*,
16 284 F. Supp. 3d 1054, 1061 (C.D. Cal. 2018) (citing *Brady v. Maryland*, 373 U.S.
17 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972)). The evidence must be
18 disclosed "at a time when the disclosure would be of value to the accused." *Gantt v.*
19 *Roe*, 389 F.3d 908, 912 (9th Cir. 2004) (granting habeas relief where prosecutors
20 failed to disclose exculpatory evidence in time for use by defendant at trial). "Strict
21 compliance with these discovery obligations is required for a defendant to be
22 afforded due process and to meaningfully exercise his Sixth Amendment right to a
23 fair and speedy trial and his right to call and confront witnesses." *Govey*, 284 F.
24 Supp. 3d at 1061.
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1 In Petitioner's April 21, 2021 Motion to Enforce the December 22, 2020
2
3 Discovery Order, Petitioner had already argued that the government's inability to
4 produce evidence in its possession before trial warranted dismissal of the
5 indictment. Dkt. 248 at 7-9.

6
7 On May 20, 2021, Petitioner's counsel sent a letter to the prosecuting attorney
8 regarding outstanding discovery, requesting that the government produce all
9 information or documents responsive to Category One ("Information and
10 Documents Regarding Kastigar Taint") by May 22, 2021 and produce all
11 information or documents responsive to Categories Two ("*Brady* Evidence from
12 Other Agencies Participating in the Prosecution"), Three ("Information Regarding
13 the Responsiveness Review of Seized Devices 1B17, 1B21, 1B81, and 1B85"), and
14 Four ("Notice of the Core Allegations for Trial") by May 24, 2021. Dkt. 353-1 (Ex.
15 A to Notice Regarding Defendant Richard Ayvazyan's Discovery Demands). With
16 respect to *Brady* evidence, counsel noted that on May 7, 2021, he had asked the
17 government several basic questions about its *Brady* obligations in light of the
18 expansive government team involved in investigating and/or prosecuting this case –
19 documents and information in any such agency's custody or control that is material
20 to preparing the defense; is favorable to the defense; would tend to contradict any
21 of the government's evidence or argument; would tend to support any of the
22 defense's stated or anticipated arguments including those listed in Petitioner's
23 November 18, 2020 discovery letter and subsequent statements to the Court; would
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1 tend to impeach any government witness; would tend to cast doubt on the accuracy
2 or admissibility of witness testimony on which the prosecution may rely; is relevant
3 to sentencing; or would tend to exculpate Petitioner or mitigate his culpability in
4 any respect, and documents or information could lead to the discovery of evidence
5 that would do the same. In its May 17, 2021 email, the government claimed it had
6 responded to this request in a court filing, but it had not.
7

8
9 In his May 20, 2021 Response to the government's Notice Regarding
10 Defendant Richard Ayvazyan's Discovery Demands, Petitioner noted that the
11 government had "roped a multitude of agencies into a sprawling investigation and
12 prosecution," and that, for example, a state investigation team had participated in
13 the investigation since at least November 5, 2020, when it participated in executing
14 the search warrants in *this case*, see e.g., Nov. 6, 2020 Mem. of Activity
15 (DOJ_PROD_0000162787, produced on May 13, 2021) (noting that the lead
16 investigator on the state case who had referred that case to the FBI/USAO in 2017
17 "conducted the search" in this case at co-defendant Dadyan and Artur Ayvazyan's
18 home); Nov. 9, 2020 FD-302 (DOJ_PROD_ 0000152511, produced on Mar. 15,
19 2021) (noting that three LAPD task force officers participated in the search in this
20 case at Residential Property 2 (allegedly owned by Ayvazyan)), and likely have
21 continued consulting, investigating, and working with the rest of the prosecution
22 team ever since. It was therefore not unreasonable to ask the government to adhere
23 to its *Brady*, Rule 16, and ethical obligations and turn over the *Brady* discovery.
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1 Nevertheless, the Court allowed the government to disclose no exculpatory
2 evidence while allowing it simultaneously to introduce evidence prejudicial to
3 Petitioner. As set forth in Petitioner's July 12, 2021 Motion For New Trial And/Or
4 Judgment Of Acquittal, *the Court allowed evidence of "reserve identities" while*
5 *simultaneously excluding exculpatory evidence related to those identities.* Dkt. 683
6 at 8-9. The government had argued that the "reserve identities" (for example, fake
7 or synthetic drivers licenses that were seized from Tamara Dadyan's residence and
8 admitted into evidence at trial as GX 57.a) were evidence of "the parts for an
9 assembly line to produce fraudulent loan applications" that were relevant to
10 whether the defendants were guilty of the single, unitary conspiracy and scheme
11 charged in Counts 1-20 of the First Superseding Indictment. *See* Dkt. 384, May 31,
12 2021 Motion in Limine to Admit Evidence Inextricably Intertwined with the
13 Charged Offenses (Government's MIL #2) (Exhibits 1-4 filed under seal) Filed by
14 Plaintiff USA as to Defendant Richard Ayvazyan, Marietta Terabelian, Artur
15 Ayvazyan, Tamara Dadyan, Manuk Grigoryan, Arman Hayrapetyan, Edvard
16 Paronyan, Vahe Dadyan, at 6.

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22 In response to this evidence, the defense attempted to introduce evidence that
23 this "assembly line of fraud" was actually part of a separate mortgage fraud scheme
24 (unrelated to PPP or EIDL applications) operated by Tamara Dadyan. The existence
25 of this other conspiracy, completely unrelated to the Grigoryan crew, made it more
26 likely that Dadyan operated her own PPP scheme using the same infrastructure
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1 from the alleged mortgage fraud scheme. This is fatal to the single, unitary
2 conspiracy and scheme charged by the government in this case. Petitioner was
3 precluded from presenting this evidence via the testimony of Detective Lyle
4 Barnes, Dkt. 664 at 1-3, and repeatedly precluded from questioning other witnesses
5 regarding the same. Because Petitioner was not permitted to present this relevant
6 and exculpatory evidence to the jury, his conviction should be set aside.
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9 Further, to the extent such evidence was excluded because it could have
10 prejudiced co-defendant Artur Ayvazyan (Dkt. 664 at 1), severance – *not the*
11 *exclusion of exculpatory evidence* – was the appropriate remedy. Under Rule 14 of
12 the Federal Rules of Criminal Procedure the district court may order a severance
13 when it appears that a defendant may be significantly prejudiced by a joint trial
14 with his co-defendants. When one defendant's exculpatory evidence might
15 prejudice another, the remedy is not to deny the first defendant the right to present
16 his defense, but rather to sever the two defendants and conduct their trials
17 separately. *See United States v. Williams*, 878 F.2d 388 (9th Cir. 1989) (both
18 antagonistic defenses and the risk of spillover evidence from another defendant's
19 defense are grounds for severance). The Courts' failure to sever the two defendants
20 and instead exclude evidence that was exculpatory vis-a-vis Petitioner prejudiced
21 Petitioner and violated his *Brady* rights.
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H. Petitioner did not receive information concerning the availability of, or ability to, appeal his convictions and/or sentence, which is ineffective assistance of counsel

A criminal defendant has the right to the effective assistance of counsel. This right is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). “To establish ‘that counsel was constitutionally ineffective for failing to file a notice of appeal,’ a defendant ‘must show (1) that counsel’s representation ‘fell below an objective standard of reasonableness,’ and (2) that counsel’s deficient performance prejudiced the defendant.’” *United States v. Cheevers*, No. 19-55484, 2022 U.S. App. LEXIS 12213, at *1-2 (9th Cir. May 5, 2022) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000) (citations omitted). “In order to satisfy the first prong, a defendant must make at least one of the following three showings: (1) that counsel ‘fail[ed] to follow the defendant’s express instructions with respect to an appeal’; (2) that ‘a rational defendant would want to appeal’ and counsel did not consult with the defendant about appealing; or (3) that the defendant ‘reasonably demonstrated to counsel that he [or she] was interested in appealing’ and counsel did not consult with the defendant. *Id.* (quoting *Flores-Ortega*, 528 U.S. at 478, 480).

Petitioner makes a sufficient showing as to any of several of the three alternatives, and his ineffective assistance claim therefore is valid. Petitioner

discussed a motion for a new trial with his attorney, but appealing the conviction or sentence was not discussed. *See* Exhibit B, Declaration of Richard Ayvazyan. Petitioner avers that based on what he knows today, he believes he had strong grounds to appeal. *Id.* Petitioner was not advised he had only fourteen days to appeal after the judgment, or that he could appeal from outside the country. *Id.* Petitioner missed an opportunity he would have seized if properly advised. *Id.* As set forth in this brief and the Court’s pleadings and transcripts, a rational defendant in Petitioner’s position would want to appeal. Petitioner’s lawyer had a duty to consult with his client about the choice to appeal. Therefore, for this reason too, Petitioner’s sentence was “imposed in violation of the Constitution or laws of the United States.”

I. The Court erred in charging only one conspiracy despite the finding of multiple conspiracies.

The court failed to properly instruct the jury on the issue of multiple conspiracies and schemes. In reviewing instructions for error, the court must ask whether the jury instructions, “taken as a whole, [] misle[d] the jury or state[d] the law incorrectly to the prejudice of the objecting party.” *City of Long Beach v. Standard Oil of California*, 46 F.3d 929, 933 (9th Cir. 1995); *see also United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) (“A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law”).

1 Here, the jury instructions misled the jury by not informing them that, if the
2 government's evidence supported the existence of multiple, separate conspiracies
3 and schemes rather than the single, unitary conspiracy and scheme charged in
4 Counts 1-20 of the indictment, they were required to acquit the defendants on all of
5 these counts. The defense was entitled to this instruction because the government
6 failed to adduce sufficient evidence to carry its burden with respect to the elements
7 of each of the above- referenced counts. The government charged a single, unitary
8 conspiracy and executions of a single, unitary scheme to defraud in the indictment
9 and were required to prove that single conspiracy and scheme beyond a reasonable
10 doubt. "A single conspiracy can only be demonstrated by proof that an overall
11 agreement existed among the conspirators." *United States v. Fernandez*, 388 F.3d
12 1199, 1226 (9th Cir. 2004) (quoting *United States v. Duran*, 189 F.3d 1071, 1080
13 (9th Cir. 1999)). To prove a conspiracy, "the evidence must show that each
14 defendant knew, or had reason to know, that his benefits were probably dependent
15 upon the success of the entire operation." *Id.* If the evidence at trial establishes
16 multiple conspiracies (as it did here), then there is insufficient evidence to support
17 conviction of a single conspiracy and any conviction must be reversed. *Id.* at
18 1226-27; *see also United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990) ("the
19 trial court instructed the jury that in order to convict Brown it must find that he was
20 a member of the single conspiracy charged in the indictment. If he did conspire but
21 not as a member of that conspiracy, a not guilty verdict was required. This is of no

1 little importance. It underscores the fact that this is not a case where a trial court
2 permitted a defendant to be convicted of a single overall conspiracy even though
3 only separate conspiracies were shown.”).

4
5 Similarly, the evidence must establish “a single scheme to defraud” in order to
6 convict on the wire and bank fraud counts. *See United States v. Wellington*, 754
7 F.2d 1457, 1463 & n.3 (9th Cir. 1985); *see also United States v. Morse*, 785 F.2d
8 771, 776- 77 (9th Cir. 1986) (“In a mail fraud case in which a defendant contends
9 that a variance has occurred between the single scheme charged in each count of the
10 indictment and the proof at trial, the jury must be instructed that, to return a guilty
11 verdict, each of the jurors must find the defendant guilty of participation in the
12 same single scheme to defraud alleged in the indictment.”); *United States v.*
13 *Mastelotto*, 717 F.2d 1238 (9th Cir. 1983) (same).

14
15 In this case, there were (if anything) multiple conspiracies and schemes
16 lacking a single “overall agreement . . . among the conspirators.” The alleged
17 conspirators’ success was not dependent upon the success of the entire operation,
18 and – even though the alleged co-conspirators had substantial pre-existing ties
19 unrelated to any charged conspiracy – there was not sufficient conspiratorial
20 interconnectivity and interdependence to permit a factual finding of a single
21 conspiracy or scheme. The evidence adduced at trial supported the existence of at
22 least two (and potentially many more) different conspiracies and corresponding
23 schemes embedded within the charged conspiracy and scheme. First, Manuk
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1 Grigoryan was at the center of a set of schemes involving credit card fraud and
2 construction funding fraud that involved the use of synthetic identities of Russian
3 and Ukrainian foreign exchange students, including Iuliia Zhadko, Viktoria
4 Kauichko, and Anton Kudiumov. This conduct pre-dated the existence of PPP
5 loans. Several of Manuk Grigoryan's dedicated group of co-conspirators, including
6 Asya Vostanikyan, Paruyr Hayrapetyan, Hayk Ohanyan, and Edvard Paronyan,
7 further engaged in Employment Development Department (EDD) fraud, and
8 separately engaged in PPP loan fraud, at the same time, using overlapping synthetic
9 identities and entities. Grigoryan's Canoga Avenue apartment, for example, was
10 found to contain references to Grigoryan's PPP loan fraud companies and synthetic
11 identities, EDD fraud documents, and medical bills for Grigoryan's wife. *See* GX
12 54.b; DX 59; DX 48.

17 Second, over the last several years, Tamara Dadyan was at the center of a
18 different set of schemes, and is alleged to involve Grigor Tatoian, Arshak
19 Bartoumian, and Art Martirosyan among others. Dadyan also deployed some of
20 these people to commit PPP loan fraud in 2020. Although Dadyan's group also
21 obtained synthetic identities derived from Russian and Ukrainian foreign exchange
22 students (among other sources) including Iuliia Zhadko, there was no joint venture
23 or sufficient interdependence between the Grigoryan and Dadyan groups to allow
24 the jury to find, beyond a reasonable doubt, the existence of a conspiracy involving
25 all of the defendants charged in the indictment. Taken together, this evidence of
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1 separate, unrelated conspiracies led by Tamara Dadyan and Manuk Grigoryan
2 required that the jury be given a multiple conspiracies and multiple schemes
3 instruction as requested by Ayvazyan. Because this instruction was not given,
4 Petitioner's sentence was imposed in violation of the Constitution or laws of the
5 United States.
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8 Petitioner was also prejudiced because he was denied a jury instruction on his
9 theory of the defense: that the government's evidence demonstrated multiple
10 conspiracies and schemes rather than the single, unitary conspiracy and scheme
11 charged. Thus, acquittal was required. The burden to receive such an instruction is
12 minimal—all that is required is “some foundation in the evidence” even if that
13 evidence is “weak, insufficient, inconsistent, or of doubtful credibility.” *United*
14 *States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989) (“A criminal defendant
15 is entitled to a jury instruction on any defense which provides a legal defense to the
16 charge against him and has some foundation in the evidence, even though the
17 evidence may be weak, insufficient, inconsistent, or of doubtful credibility. Where a
18 defendant's requested instruction is supported by some evidence, a trial court's
19 failure to give it is reversible error.”). A jury instruction on the defendant's theory
20 of the defense is a right “so basic to a fair trial” that failure to give it is reversible
21 error. *United States v. Escobar de Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984) (“The
22 right to have the jury instructed as to the defendant's theory of the case is one of
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1 those rights ‘so basic to a fair trial’ that failure to instruct where there is evidence to
2 support the instruction can never be considered harmless error.”) (citations
3 omitted).

4
5 At a minimum, a specific unanimity instruction was required because of the
6 specter of multiple conspiracies and schemes underlying the indictment. Petitioner
7 requested such an instruction. *See* June 25, 2021 Trial Transcript (AM & PM) at
8 9:14-10:2. Such an instruction is required where evidence of multiple conspiracies
9 is presented, because there is a “genuine possibility of jury confusion” or a
10 possibility “that a conviction may occur as the result of different jurors concluding
11 that the defendant committed different acts.” *United States v. Lapier*, 796 F.3d
12 1090, 1096 (9th Cir. 2015) (“Because the evidence in this case tended to show
13 multiple conspiracies instead of the single charged conspiracy, the failure to give a
14 specific unanimity instruction was plain error violating [defendant]’s substantial
15 right to a unanimous jury verdict as granted by Article III, § 2, and the Sixth
16 Amendment of the United States Constitution.”). As such, Petitioner’s sentence was
17 imposed in violation of the Constitution or laws of the United States, and must be
18 vacated and set aside.

19 20 21 22 23 24 **IV. CONCLUSION**

25 For the reasons set forth above, Petitioner’s sentence was “imposed in
26 violation of the Constitution or laws of the United States.” Pursuant to 28 U.S.C. §
27 2255, “[u]nless the motion and the files and records of the case conclusively show
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1 that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing
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3 thereon, determine the issues and make findings of fact and conclusions of law with
4 respect thereto.” 28 U.S.C. § 2255(b). Here, Petitioner has alleged cognizable
5 claims that are supported by the record. Therefore, the Court should vacate the
6 conviction or promptly schedule this matter for an evidentiary hearing.
7

8 Dated: December 8, 2022

Respectfully submitted,

9
10 /s/ Carlo Brooks

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CERTIFICATE OF SERVICE

I certify that I served a copy of this document and its attachments on the Court and all parties by filing this document with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all counsel of record.

DATED: December 8, 2022

Respectfully submitted,

/s/ Carlo Brooks
Carlo Brooks, Esq.